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Nos. 104 and 105

In the Supreme Court of the United States

OCTOBER TERM, 1932

BANKERS POCAHONTAS COAL COMPANY, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

D. J. F. STROTHER, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 49–57)[1] is reported in 18 B. T. A. 901. The opinion of

[1] The record references refer to the record in the *Bankers Pocahontas Coal Company* case (No. 104) unless otherwise indicated.

the Circuit Court of Appeals (R. 119–134) is reported in 55 F. (2d) 626.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered in each case January 27, 1932. (R. 135–136; Strother R. 111.) A petition of the petitioners for a rehearing covering both cases was presented February 26, 1932. (R. 137–167; Strother R. 112–138.) A petition of the respondent for a rehearing in the *Strother* case was presented February 26, 1932. (Strother R. 139–141.) Both petitions were denied by an order entered March 7, 1932. (R. 169–170; Strother R. 141–142.) By leave of court, the petitioners filed a supplemental petition for rehearing on April 12, 1932. (R. 171–183; Strother R. 143–153.) The supplemental petition for rehearing was denied April 29, 1932. (R. 185; Strother R. 154.) The petition for certiorari was filed May 23, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether royalties received by the petitioner, Bankers Pocahontas Coal Company, under an instrument, in form a contract of lease, which granted the privilege of mining and coking coal on certain property in West Virginia, are taxable income.

2. Whether distributions made by that company to Strother as a stockholder were in part taxable to him as dividends.

3. Whether (in case the royalties are taxable income) an allowance for depletion should be based on the minimum royalties paid in each year or upon the number of tons actually mined, where the tonnage mined is less than the amount that the lessor had the right to mine for the minimum royalty payment.

4. Whether a judgment against a Collector of Internal Revenue in an action brought by petitioner in a United States District Court, involving other taxable years than those in question in the present case, is *res adjudicata* of certain issues in the present case.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, *infra,* pp. 18–23.

STATEMENT

The respondent determined deficiencies in income and profits taxes of the petitioner Bankers Pocahontas Coal Company for the years 1920 to 1926 inclusive, amounting to $39,851.99 (R. 12, 23, 29), and in income taxes of the petitioner Strother for the years 1919 to 1925, inclusive, amounting to $8,874.50. (Strother R. 11, 17, 23.) The petitioners appealed from these determinations to the Board of Tax Appeals.

The material facts as found by the Board may be summarized as follows (R. 39–49):

The petitioner Bankers Pocahontas Coal Company (hereafter called the Coal Company) is a West Virginia corporation formed in 1912. In that year it acquired in fee 6,200 acres of land in West Virginia, including the mineral rights therein. Also, by assignment, it acquired and holds the interest of the prior owners in certain contracts of lease executed in 1901 and 1902 with several coal operating companies, to which the tract of land was subject. By these contracts the prior owners did "demise, let and lease for coal mining and coal coking purposes only" to the coal operating companies severally, certain parts of the tract. The form of contract used was that prevailing in the West Virginia coal fields, and followed the form used in the State of Pennsylvania. (R. 39–40.) Extracts from a typical contract appear at R. 40–42. The cost to the Coal Company of the properties was between $407,000 and $507,000. (R. 42.)

Schedules appearing in the findings of fact (R. 43–46) contain a list of the contracts and show the estimated recoverable coal on March 1, 1913, and the number of tons mined, the number of tons paid for, and the royalty receipts in the taxable years here in question, under each contract.

In these years the Coal Company was on a cash receipts and disbursements basis of accounting. Its income, except for minor items, consisted of payments received under these contracts. (R. 46.)

The respondent treated the income as royalty payments under leases, and allowed the Coal Company, as lessor, a deduction for depletion at the rate of 3.6 cents per ton of coal mined. This is the rate that had been allowed by the respondent for 1919 and prior years. (R. 47.)

Additional taxes amounting to $6,267.08 were assessed and collected for the years 1914 to 1919, inclusive. In 1923, the Coal Company brought an action in the United States District Court for the Southern District of West Virginia against the Collector of Internal Revenue to recover those taxes. The Coal Company contended that payments received by it under the contracts were proceeds of the sale of coal in place consummated before March 1, 1913, or of choses in action owned on that date and therefore not income; or, otherwise, that in computing net income it was entitled as lessor to a depletion rate of 5 cents per ton of coal mined. The court held the receipts were income and found that the plaintiff was entitled to a depletion rate of 5 cents a ton, and entered judgment in its favor for $5,373.01, which was duly paid. The Collector of Internal Revenue, as defendant, was represented in that action by the United States Attorney and the Solicitor of Internal Revenue (now General Counsel). (R. 47.)

In the several years here involved the petitioner Strother, as a stockholder, received payments from the Coal Company. He reported them in his in-

come-tax returns but did not include them as taxable income. The Coal Company used such portion of the royalty payments as was necessary for ordinary and necessary expenses, set aside a reserve to meet pending Federal taxes, and distributed the balance to its stockholders. The respondent added the entire amount of the distribution to Strother to his net income without allowance for such part thereof as may have come out of the depletion reserve of the Coal Company. Deficiencies against Strother were determined by the respondent accordingly. (R. 72–73.)

In the case of the Coal Company, the Board of Tax Appeals held that the payments received by the petitioner under the contracts were royalties which were properly part of its gross income; that it was entitled to a reasonable allowance for depletion, and that the petitioner had failed to prove that the allowance determined by the respondent of 3.6 cents per ton was not reasonable. (R. 51, 54.) On February 27, 1930, the petitioner filed a motion for a rehearing and alleged as error, among others, that the Board had failed to hold that the decision in the case of this petitioner against the Collector of Internal Revenue, in the United States District Court for the Southern District of West Virginia, was *res adjudicata* of the issue with respect to the depletion rate. (R. 57–59.) The motion was denied. (R. 59–60.) Upon final settlement of the

amount of deficiencies under the Board's decision, petitioner filed objections to the proposed determinations submitted by respondent and presented counter proposed determinations. Petitioner therein contended for the first time that the depletion allowance should be on the basis of the minimum royalty payments and not upon the tonnage of coal mined, where the latter was less than was permitted to be mined for the minimum royalty payment in any year. (R. 66–69.) At the oral hearing on final settlement, a motion was made on behalf of both petitioners for a rehearing to enable them to offer additional evidence for the purpose of raising this question, and the Board denied the motion. (R. 69–70, 109–110.) The Board thereupon entered its order in the Coal Company case redetermining the deficiencies in the aggregate amount of $39,171.05. (R. 70–71.) The Circuit Court of Appeals sustained the decision of the Board on all of the above issues.[2]

In the Strother case, before the Board, it was agreed between the parties that the distributions received by Strother were nontaxable to the extent that they came out of the depletion reserve of the Coal Company. (R. 57.) The respondent thereupon filed a proposed settlement of the amount of

[2] There were certain other issues before the Board and the Circuit Court in the Coal Company case which are not involved in the present petition.

the deficiencies. (Strother R. 49–56.) The petitioner Strother filed objections and a counter proposal alleging error, among others, in the respondent's computation in that it did not accord with the allowances for depletion made to the Coal Company. (Strother R. 57–63, 64–70.) After oral hearing (Strother R. 81–86) the Board adopted the computations of the respondent and entered its order redetermining deficiencies aggregating $5,806.07 and an overassessment for the year 1924 to be abated in the amount of $36.38. (Strother R. 71–72.) The Circuit Court of Appeals decided Strother should be given an opportunity to introduce additional testimony on the issues raised by him on the hearing on final settlement, and it remanded this case for further proceedings in accordance with its opinion in the Coal Company case. (Strother R. 110.)

ARGUMENT

I

The Board of Tax Appeals held that the contracts in question were leases and the payments thereunder were royalties and properly part of the gross income of the Coal Company. (R. 51.) The Circuit Court of Appeals assumed for the purposes of its decision that the law of West Virginia was that a lease of coal lands constituted a sale of the coal in place, and it held that the royalty payments

nevertheless constituted taxable income. The petitioner contends, first, that the decision violates the Sixteenth Amendment to the Constitution in that it puts a tax upon the proceeds of a sale of property made prior to the effective date of the Amendment, and next, that Congress did not intend to tax such receipts.

We believe that both contentions are fully answered by previous decisions of this Court. In *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103, which arose under the income-tax provisions of the Tariff Act of 1913, c. 16, 38 Stat. 166, 181, Sec. 2, it was contended that the proceeds of mining without an adequate allowance by way of deduction for exhaustion of the ore body was a tax upon property because of its ownership and therefore subject to apportionment. Of this contention, this Court said (pp. 113–114):

> It moreover rests upon the wholly fallacious assumption that looked at from the point of view of substance a tax on the product of a mine is necessarily in its essence and nature in every case a direct tax on property because of its ownership unless adequate allowance be made for the exhaustion of the ore body to result from working the mine. We say wholly fallacious assumption because independently of the effect of the operation of the Sixteenth Amendment it was settled in *Stratton's Independence* v. *How-*

bert, 231 U. S. 399, that such a tax is not a tax upon property as such because of its ownership, but a true excise levied on the results of the business of carrying on mining operations (pp. 413 *et seq.*).

That case and *Stratton's Independence* v. *Howbert*, 231 U. S. 399, involved the proceeds of ores mined by a corporation from its own premises. *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, involved moneys received from lessees under mining leases, and the question was whether the receipts were income under the corporation excise tax provisions of the Tariff Act of 1909, c. 6, 36 Stat. 11, 12. This Court decided, on the principles announced in the *Baltic Mining Co.* and *Stratton's Independence* cases, that the royalties received under the leases were income. It was held that since the royalties resulted from the process of mining, which is equivalent to manufacturing, the gains are "derived from capital, from labor, or from both combined." (p. 521.) See also, *United States* v. *Biwabik Mining Co.*, 247 U. S. 116; *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364; *Hirschi* v. *United States*, 67 C. Cls. 637, certiorari denied, 280 U. S. 576; *Rosenberger* v. *McCaughn*, 25 F. (2d) 699 (C. C. A. 3d), certiorari denied, 278 U. S. 604; *Alexander* v. *King*, 46 F. (2d) 235 (C. C. A. 10th), certiorari denied, 283 U. S. 845; *Berg* v. *Commissioner*, 33 F. (2d) 641 (App. D. C.), certiorari denied, 280 U. S. 598; *Burkett* v.

Commissioner, 31 F. (2d) 667 (C. C. A. 8th), certiorari denied, 280 U. S. 565. The *Rosenberger* case, *supra,* involved the question whether royalty payments under a lease of Pennsylvania coal lands similar to the leases involved in the instant case were taxable income. The Circuit Court of Appeals held that they were, although it recognized that under Pennsylvania law such leases constituted sales of coal in place. This Court declined to review the decision.

The cases of *Ferguson* v. *Commissioner,* 45 F. (2d) 573 (C. C. A. 5th), and *Harmel* v. *Commissioner,* 56 F. (2d) 153 (C. C. A. 5th), referred to by petitioner, are not in conflict with the decision of the court below in the case at bar upon the present question. They involved the question whether bonuses or cash payments received by the lessor upon the execution of oil and gas leases of land in Texas were taxable as gain derived from the sale of a capital asset or ordinary income from the use of the property. The court held these receipts were taxable as capital gains, but in the *Ferguson* case, which also involved royalties thereafter to be received, it held that such royalties were taxable as ordinary income since they represent the retained interest of the lessor or vendor in the property or minerals, which he receives from time to time under the contract. The decision in the *Ferguson* case is therefore in accord with the case at bar so far as

the present question is concerned, and the question was not involved in the *Harmel* case.[3] Cf. *Reinecke* v. *Spalding*, 280 U. S. 227.

We submit that in any view of the legal effect of the contracts under state law the royalties received by the Coal Company were properly included in gross income.

II

Since, as we contend, the royalty payments were gross income to the Coal Company, it follows that the distributions to petitioner Strother were taxable to him as dividends to the extent that they were paid out of surplus.

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[3] On April 18, 1932, this Court granted the Commissioner's petition for certiorari in the *Harmel* case, and it is now pending as *Burnet* v. *Harmel*, No. 26, October Term, 1932. In the *Harmel* case the court held that the Texas rule that leases of oil lands constituted sales of the oil, required the conclusion that a bonus paid upon the execution of such a lease constituted capital gain and not income. In the present case the court assumed that the leases constituted sales of the mineral in place under West Virginia law, but held, nevertheless, that royalties paid under such leases constituted taxable income. Thus as to such royalties the decision of the court below is in accord with the decision in the *Ferguson* case, so far as it concerned similar royalties. In its petition for certiorari in the *Harmel* case the Government pointed out that the decision in that case was in conflict in principle with the present decision on the question of the effect of the local law. In the present case the effect to be given to the local law is not material, since the decision would go against the petitioner whatever effect may be given to the local law. Consequently, this conflict does not warrant certiorari in the present case.

III

The Coal Company contends that the annual depletion allowable, in those years in which the tonnage mined was less than the tonnage which its lessees had the right to mine for the minimum royalty payment, should be based upon the minimum payment and not upon the number of tons actually extracted. This issue was raised by petitioner for the first time upon a motion for a rehearing at the hearing upon the recomputation of the deficiencies under Rule 50 of the Board's rules of practice, and the petitioner offered to prove the facts to sustain its contention that it would increase the amount of deduction allowable. (R. 68.) The Board denied the motion. (R. 69–70.) The Circuit Court of Appeals held it was within the sound discretion of the Board to grant or deny petitioner's motion, and the court could not say that there was an abuse of discretion. (R. 129.)

It is provided in Article 215 (b) of Regulations 45 (*infra*, p. 20) that in a case in which the required annual payment is regarded as the royalty for the equivalent number of units whenever the same shall be thereafter extracted and removed from the premises, the allowable deduction in the year of payment may be based on the number of units so paid for; and no deduction is permitted in subsequent years on account of the extraction of mineral so paid for.

But it appears that even if the case were reopened, petitioner would not be entitled to the deduction claimed. The theory upon which the claim is based is that the amount by which the minimum royalty received exceeds the total per ton royalty upon the coal actually extracted within the year, is an advance payment of royalty on coal which may be mined by the lessees in the future without further ro alty payments. The specimen lease introduced in evidence and which, it was testified, is typical of the others, provides for a fixed annual payment "as a minimum rental or royalty for the property," whether the quantity of coal mined and coke manufactured should produce that amount of royalty or not. The right of the lessees to mine coal thereafter free from royalty payment extended only to the next succeeding year and then it applied only to quantities above such amount as would be paid for by the minimum royalty in that year. Except on these two conditions, there was no right in the lessees to mine coal for past payments, and the findings indicate that there was very little, if any, coal mined upon the conditions mentioned. This is shown by the records of the mines operated by the lessees. (R. 44–46.) At the Fall River Pocahontas Collieries, the tonnage mined each year was the same as that paid for; at the Superior (Cletus) and at the Exeter Mines, the amount mined each year was always less than that paid for; at the Pocahontas Smokeless Coal Company mine the tonnage mined was substantially the

same as that paid for except as to the year 1920, when the amount mined was greater than that paid for, and this would affect only the year 1919, which is not involved here; at the Warwick and Hensley mines there are some variations, but they are not such as can be accounted for by the application of the minimum royalty provision mentioned above. (R. 44–46.)

Petitioner urges that the decision of the court below on this issue is in conflict with the decision in *Murphy Oil Co.* v. *Burnet,* 55 F. (2d) 17 (C. C. A. 9th), now pending in this Court (No. 80) on a writ of certiorari granted May 31, 1932. We believe the case at bar is distinguishable from the *Murphy Oil* case. There a substantial cash payment was made to the lessor upon the execution of an oil lease, in addition to which regular royalties were to be paid. The question was whether such payment was to be treated as entirely capital, entirely income or partly capital and partly income for purposes of adjusting the basis for depletion. In the case at bar, the payments were minimum annual rentals or royalties and did not result in a continuing right in the lessees to mine coal therefor. The lessees' right to mine coal for past payments was limited and conditional; the conditions under which coal could be mined free from royalties apparently did not arise in any of the years in question, and therefore the petitioner's property was not depleted either in fact or in theory because of the excess of minimum payments over the equivalent royalty of the tonnage extracted.

IV

The Coal Company contends that the decision of the District Court in the action brought by it against the Collector of Internal Revenue to recover taxes paid for earlier years is *res adjudicata* on the question of the rate of depletion to be allowed. We submit that the doctrine is not applicable because the parties are different and, in addition, because different causes of action or rights were involved since the two actions involve different taxable years.

The present proceeding is in effect a proceeding against the United States. While the Commissioner of Internal Revenue is the nominal party, he is proceeded against in his official and representative capacity as an officer of the United States, which is the real party in interest. The proceeding was brought by the taxpayer to review a determination of the Commissioner that the taxpayer is indebted to the United States for additional taxes. On the other hand, the suit in the district court was against the Collector of Internal Revenue. In *Sage* v. *United States,* 250 U. S. 33, this Court held that the United States was not privy to a judgment against a collector of internal revenue, and that the judgment is not a bar in a suit brought against the United States in the Court of Claims involving a part of the same tax. In that case, this Court pointed out that the suit against the collector is personal and its incidents are different. We believe that the petitioner's argument that the Commissioner is

privy to the suit against the collector is fully answered by what this Court said in the *Sage* case, which the court below accepted as controlling upon this question. See also *Graham & Foster* v. *Goodcell,* 282 U. S. 409, 430; *Smietanka* v. *Indiana Steel Co.,* 257 U. S. 1, 4, 5. Cf. *Union Trust Co.* v. *Wardell,* 258 U. S. 537; *United States* v. *Stone & Downer,* 274 U. S. 225.

CONCLUSION

The decision of the court below is correct and no sufficient reason appears for review by this Court. The petition should be denied.

Respectfully submitted.

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JULY, 1932.

APPENDIX

Statutes and Regulations Involved

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1077:

> Sec. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:
>
> * * * * *
>
> (9) In the case of mines, * * * a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted: *Provided,* That in the case of such properties acquired prior to March 1, 1913, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date: * * * such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee.

Revenue Act of 1921, c. 136, 42 Stat. 227, 254:

> Sec. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:
>
> * * * * *

(9) In the case of mines, * * * a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted: *Provided,* That in the case of such properties acquired prior to March 1, 1913, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date: * * * such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee.

Revenue Act of 1924, c. 234, 43 Stat. 253, 283:

SEC. 234. (a) In computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

* * * * *

(8) In the case of mines, * * * a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee. (U. S. C., Title 26, Sec. 986.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 41:

SEC. 234. (a) In computing the net income of a corporation subject to the tax im-

posed by section 230 there shall be allowed as deductions:

* * * * *

(8) In the case of mines, * * * a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee. (U. S. C. App., Title 26, Sec. 986.)

Treasury Regulations 45 (1920 Edition):

ART. 215. *Depletion—Adjustments of accounts based on bonus or advanced royalty.*—(a) Where a lessor receives a bonus or other sum in addition to royalties, such bonus or other sum shall be regarded as a return of capital to the lessor, but only to the extent of the capital remaining to be recovered through depletion by the lessor at the date of lease. If the bonus exceeds the capital remaining to be recovered, the excess and all the royalties thereafter received will be income and not depletable. If the bonus is less than the capital remaining to be recovered by the lessor through depletion, the difference may be recovered through depletion deductions based on the royalties thereafter received. The bonus or other sum paid by the lessee for a lease made on or after March 1, 1913, will be his value for depletion as of date of acquisition.

(b) Where the owner has leased a mineral property for a term of years with a requirement in the lease that the lessee shall extract and pay for, annually, a specified

number of tons, or other agreed units of measurement, of such mineral, or shall pay, annually, a specified sum of money which shall be applied in payment of the purchase price or royalty per unit of such mineral whenever the same shall thereafter be extracted and removed from the leased premises, the value in the ground to the lessor, for purposes of depletion, of the number of units so paid for in advance of extraction will constitute an allowable deduction from the gross income of the year in which such payment or payments shall be made; but no deduction for depletion by the lessor shall be claimed or allowed in any subsequent year on account of the extraction or removal in such year of any mineral so paid for in advance and for which deduction has once been made.

(c) If, for any reason, any such mineral lease shall be terminated or abandoned before the mineral which has been paid for in advance has been extracted and removed, and the lessor repossesses the leased property, the lessor shall adjust his capital accounts by restoring to the capital sum of the property the depletion deductions made in prior years on account of royalties on mineral paid for but not removed, and his income account shall be adjusted so as to include the amount so restored to capital sum as income of the year such lease is terminated or the property repossessed, and the tax thereon paid.

(d) Upon the expiration, termination, or abandonment of a lease, without the removal of any or all of the mineral contemplated by the lease, the lessor shall be required to restore to capital account so much of the bonus received and deducted from capital recover-

able through depletion as is in excess of the actual depletion or loss in value sustained as a result of the operations under the lease and the corresponding amount will be income for the year in which the lease expires, terminates, or is abandoned.

Paragraphs (b) and (c) of the above article appear in the same form in Article 215 of Regulations 62, and Articles 216 of Regulations 65 and 69, and in Article 236 of Regulations 74.

Paragraphs (a) and (d) originally appeared in the same form as above in Article 215 of Regulations 62 and Article 216 of Regulations 65, but were afterwards amended by T. D. 3938, C. B. V–2, pp. 117–118, promulgated November 13, 1926, to read as follows:

Article 215 of Regulations 45 (1920 edition), article 215 of Regulations 62, and article 216 of Regulations 65 are hereby amended to read as follows:

ART. 216 (215). *Depletion—Adjustments of accounts based on bonus or advanced royalty.*—(a) Where a lessor receives a bonus in addition to royalties, there shall be allowed as a depletion deduction in respect of the bonus an amount equal to that proportion of the cost or value of the property on the basic date which the amount of the bonus bears to the sum of the bonus and the royalties expected to be received. Such allowance shall be deducted from the amount remaining to be recovered by the lessor through depletion, and the remainder is recoverable through depletion deductions on the basis of royalties thereafter received.

* * * * *

(d) Upon the expiration, termination, or abandonment of the lease, without the removal of any or all of the mineral contemplated by the lease, the lessor shall be required to restore to capital account the excess of the depletion theretofore allowable in respect of the bonus and royalty payments over the actual depletion or loss in value sustained as a result of the operations under the lease, and a corresponding amount must be returned as income for the year in which the lease expires, terminates, or is abandoned.

All rulings inconsistent herewith are hereby revoked.

Paragraphs (a) and (d) as thus revised appear in Article 216 of Regulations 69 and, with immaterial changes, in Article 236 of Regulations 74.

U. S. GOVERNMENT PRINTING OFFICE: 1932